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No. 91-1859

Supreme Court, U.S.
FILED
JUN 15 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

INDUSTRIAL HELICOPTERS, INC.,

Defendant-Petitioner,

versus

MICHAEL J. GREEN,

Plaintiff-Respondent,

UNITED STATES FIDELITY
& GUARANTY COMPANY,

Plaintiff/Intervenor-Respondent.

Petition For Writ Of Certiorari
To The Louisiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether Louisiana may supplement the general maritime remedies for actions in tort.

PARTIES TO THE PROCEEDING BELOW

All parties to the proceeding below appear in the style of this case. There are no parent or subsidiary companies to be listed pursuant to S.Ct. R. P. 29.1

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MAY IT PLEASE THE COURT:

UNITED STATES FIDELITY AND GUARANTY COMPANY, respondent and intervenor in this suit, respectfully prays that a writ of certiorari not be granted to the petitioner **INDUSTRIAL HELICOPTERS, INC.,** for the reasons listed below:

SUMMARY OF ARGUMENT

The fatal flaw in Industrial Helicopter's petition for writ of certiorari consists of the absence of any grounds for jurisdiction of this court. Although the petitioner sets forth the federal statute and Supreme Court Rules under which jurisdiction may exist, it never describes how the issues of this case bring those rules into play, nor does it identify any conflicting federal or state case law. More significantly, no substantial federal question is raised by the petitioner, as this court held in previous decisions that states can supplement general maritime law. In an attempt to rectify these defects, the petitioner misstates the law and the Louisiana Supreme Court's analysis.

I.

LACK OF GROUNDS FOR JURISDICTION

A. 28 USC 1257

The legislature of the United States has determined that the Untied States Supreme Court has jurisdiction under 28 USC 1257A when "the validity of a statute of any state is drawn in question on the ground of its being repugnant to the laws of the United States."

Petitioner dutifully sets forth this language; however, there is no mention in the statement of grounds for jurisdiction or in any other part of the petition, that the Louisiana statute is repugnant to the laws of the United States. On the contrary, while Louisiana Civil Code Article 2317, regarding strict liability, is cited by the petitioner, the validity of the Statute itself is never called into question. Rather, in general terms, the petitioner argues

that the application of the Louisiana statute was inappropriate in this case. Because the validity of the statute remains inviolate, jurisdiction is not automatic under the federal statute listed above, but is merely discretionary with this Court. *Memphis Natural Gas Company v. Beeler,* 315 U.S. 649, 650-51 (1942); *Hanson v. Denckla,* 357 U.S. 235, 244 (1958); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 562 (1980); *Calder v. Jones,* 465 U.S. 783, 787 (1984).

Furthermore, 28 USC 1257A stipulates that jurisdiction exists if the validity of the statute "is drawn into question on the ground of its being repugnant to the laws of the United States". Although the petitioner asserts the conclusion that the addition of the remedy of strict liability would create a new federal maritime cause of action and that "remedies cannot make changes in substantive maritime law", the petition lacks any reference to a specific constitutional provision or federal statue with which this remedy conflicts. Nor does the petition define the "substantive maritime law" which this remedy would "change".

B. SUPREME COURT RULE 14

As stated above, one of the primary flaws in the petition for writ of certiorari remains that it never specifies which aspects of the federal law are in question. Rule 14 of this Court requires that the petitioner set forth,

> the Constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim and giving the appropriate citation therefore. If the provisions

> involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix to in sub-paragraph .1(k) of this rule. Rule 14 (f)

No such federal law is set forth anywhere in the petition. If the petitioner bases its request for writ of certiorari on the admiralty common law, it should at least set forth the jurisprudential rules or characteristics of that common law which are at stake in this case.

C. SUPREME COURT RULE 10

Although the petition sets forth the rules for consideration of petitions for writ of certiorari, it lacks any reference to adherence to these rules. Rule 10.1(b) allows consideration, "when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of the United States Court of Appeals". After minute inspection of the petition, counsel for respondent could find no reference to any federal appeals or state supreme court decision which conflicts with the Louisiana Supreme Court decision below.

Rule 10.1(c), also listed by the petitioner provides for consideration "when a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court, or has decided a federal question in a way that conflicts with the applicable decisions of this court". The petitioner never specifies whether it is attempting to base jurisdiction on the fact that a certain issue should be

settled by this Court, or whether Green conflicts with a prior decision of this Court.

However, in arguing that uniformity in maritime law must be upheld, the petitioner cites *Miles v. Apex Marine Corporation,* 111 S.Ct. 317 (1990). If this is the case on which petitioner relies for jurisdiction, this reliance is misplaced, for no conflict exists between *Miles* and the decision of the Louisiana Supreme Court in *Green v. Industrial Helicopters,* 593 So.2d 634 (La. 1992). In the case at issue here, the plaintiff merely seeks to adopt a state remedy in addition to those rights which he has under general maritime law. In contrast, *Miles v. Apex Marine, **supra,*** dealt with a very specific statutory provision, the Jones Act, 46 USCA Section 688. Because "Congress has spoken directly to the question of recoverable damages on the high seas" for seamen under the Jones Act, no supplementation of those remedies were allowable. *Miles,* 111 S.Ct. 317, at 325. However, this Court also recognized that when an area is left open by statute, "supplementation was entirely appropriate." ***Id.*** In this case, Congress has not spoken in regard to the damages allowable, and therefore *Miles* in no way conflicts with the lower court's decision.

D. THE REQUIREMENT OF SUBSTANTIALITY

The petitioner's request for writ of certiorari lacks substantiality. This Court, however, has recognized for over a century, that a federal question must be substantial to confer jurisdiction on the Supreme Court. *New Orleans v. New Orleans Water Works,* 142 U.S. 79 (1891). This Court has determined that substantiality remains a function of

how earlier decisions related to the same issue. See Wiener, "The Supreme Court's New Rules" 68 Harv. L. Rev. 20, 51 (1954); *Zucht v. King*, 20 U.S. 174, 43 S.Ct. 24 (1922).

In *Zucht*, San Antonio city ordinances provided for exclusion of children from school who could not provide a certificate of vaccination. This Court found that the validity of such ordinances under the Federal Constitution was not substantially at issue, because a significant number of prior cases had determined that such ordinances were allowable under the police power of a state.

Similarly, this Court has held in a variety of cases that a state may supplement General Maritime Law when the state action is not hostile to either the general principles of maritime law or to specific federal legislation. *Just v. Chambers*, 312 U.S. 383, 61 S.Ct. 687; *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590 (1973); *Skiriotes v. Florida*, 313 U.S. 69, 61 S.Ct. 924, rehearing denied 313 U.S. 599, 51 S.Ct. 1093 (1941); *Huron v. Portland Cement Company v. City of Detroit*, 362 U.S. 440, 80 S.Ct. 813 (1960).

Because the petitioner has not explained which principles of maritime law have been violated, and as this Court has ruled in favor of additional state remedies in such cases, no real issue exists as to the federal question presented by the petitioner. Therefore, based on this lack, respondent, United States Fidelity and Guaranty Company, respectfully requests that this esteemed Court deny the petition for writ of certiorari.

II.

MISSTATEMENTS OF LAW

Although the petitioner presents a superficial view of the Louisiana Supreme Court's analysis, it also includes certain glaring misstatements that must be addressed here.

A. BASIS FOR APPLICATION OF STATE LAW

Petitioner begins its analysis with the assertion that the inclusion of Louisiana Civil Code Article 2317, in an admiralty tort suit, will lead to the application of each adjacent state's law "depending upon the fortuitous event of the site of the accident." If this Court will examine the facts of the case set forth in the record, it will see that a variety of factors were considered by the Louisiana Supreme Court in applying Louisiana's law to this case:

> Plaintiff is a Louisiana resident; Industrial (Helicopters), a Louisiana Corporation; the pilot, a Louisiana resident, and the helicopter was stored in a Louisiana hanger. The contract of carriage between plaintiff's employer and defendant was convicted in Louisiana, the mission started in Louisiana and was to end in Louisiana. (See petitioner's Appendix volume 1 page A-6.)

Obviously the site alone was not determinative of the law applied.

B. SUPPOSED OPPOSITION OF MARITIME LAW

In regard to the application of an adjacent state's law, petitioner goes on to argue that, "General Maritime Law has always been opposed to any such operation of law and this decision now sets these possibilities in motion." (Petition at 7). Not only does the petitioner not cite any case law to substantiate General Maritime Law's supposed opposition, but it also ignores those cases mentioned above, where an adjacent state was permitted to supplement Maritime law.

C. ANALYSIS OF LOUISIANA SUPREME COURT

Petitioner argues that the Louisiana Supreme Court analyzed the application of strict custodial liability law "by determining whether there is applicable federal legislation identifying the 'characteristic features in maritime law' and by examining the 'scope of the uniformity requirement'." In making this assertion, petitioner ignores the basic format of the Louisiana Supreme Court's argument. In introduction, the lower court first examined the law in regard to additional state remedies in terms of the "savings to suitors" clause and various case law. It also recognized the difficulty of finding a set rule for such remedies.

The Court then examined the application of an interest balancing test in regard to federal versus state law, and cited those cases where a strong state interest merited supplementation. The Court then went through a three step process to determine whether any conflict existed between federal and state law:

1) It determined whether there was applicable federal legislation.

2) It attempted to identify the "characteristics of maritime law".

3) It examined the scope of the uniformity requirement.

D. *ASKEW V. AMERICAN WATERWAYS OPERATORS, INC.*

In explaining the need to determine applicable federal legislation, the Court cited *Askew v. American Waterways Operators, Inc.*, ***supra,*** which held that "state regulation is permissible, absent a clear conflict with the federal law." *Askew,* 411 U.S. at 342, 93 S.Ct. at 1600. In its attack on the Supreme Court's analysis, petitioner insists that the "federal act specifically allowed supplementation by state regulations" and that it is therefore distinguishable from general maritime law. (Petition at 9, 10). What it ignores in this statement is that the Supreme Court was dealing with *two* federal acts in *Askew.* The first was the Water Quality Improvement Act of 1970; it was this act which allowed state regulation. However, in making its pronouncement that state regulation is permissible, this Court was dealing with the Admiralty Extension Act, which makes no reference to additional remedies. *Askew,* 411 U.S. at 341, 93 S.Ct. at 1600. Thus, petitioner ignores the extensive analysis of this Court in dealing with uniformity within the general maritime law and the achievement of that uniformity despite, and because of, supplementation by the states.

Petitioner also characterized *Askew* as a case in which the supplemental statute was the only remedy available. It attempts to distinguish this case by saying that federal admiralty tort laws provide Michael Green a remedy for recovery of damages. However, as the lower courts all found that the only basis of recovery for the plaintiff, Michael Green, was that of strict liability, this distinction must fail.

E. SUPPOSED LACK OF AUTHORITY

Petitioner claims that the Louisiana Supreme Court found that the General Maritime Law authorizes application of state strict liability "without any legal authoritative basis." (Petition at 10). This is a clear misstatement of the analysis of the Louisiana Supreme Court. The Petitioner's assertion refers to the Court's examination of the characteristic features of Maritime Law. In making that determination, the lower court examined the traditional remedies available at admiralty. After an extensive review of both statutory and case law, the court found that there was no hostility in these remedies to strict liability. Such a review does not constitute a lack of authoritative basis.

F. UNSEAWORTHINESS

Finally, the Petitioner argues that the Louisiana Supreme court incorrectly applied the doctrine of unseaworthiness. (Petition at 15) However, an examination of the lower court's opinion will reveal that it did not apply unseaworthiness to this action, rather it merely

examined unseaworthiness and other remedies in its search for the scope of the uniformity requirement.

CONCLUSION

This case should not be before this Court for a variety of reasons. The petition neglects the jurisdictional requirements of both 28 USC 1257A and the U.S. Supreme Court Rules. Also, prior U.S. Supreme Court decisions allowing supplemental state remedies make any federal issue presented here insubstantial. In an attempt to create substantiality, the petitioner has misstated both the law and the Louisiana Supreme Court's analysis of that law. Therefore, respondent United States Fidelity and Guaranty respectfully requests that this Court deny petitioner's request for writ of certiorari.

DATED this 15th day of June, 1992.

Respectfully submitted,

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